



Recommendation 77-2

Judicial Review of Customs Service Actions

(Adopted September 15-16, 1977)

A. *Jurisdiction and Powers of the Customs Court.* The Customs Court has exclusive jurisdiction to review decisions of the Customs Service (1) denying protests of importers relating to certain enumerated matters and (2) rejecting petitions of United States manufacturers, producers or wholesalers to challenge certain actions taken with respect to merchandise imported by others. Actions of the Customs Service suspending or revoking customs brokers' licenses are reviewable, by statute, in the courts of appeals.¹ There are other actions of the Customs Service that are administratively final but for which no specific statutory provision for review has been made. These include decisions made by the Service to suspend or discontinue permits for immediate delivery of merchandise as well as decisions to exclude certain types of merchandise from entry. Such actions are now reviewable, if at all, in the district courts pursuant to their general or special jurisdiction.

Moreover, the Customs Court does not have power at present to "compel agency action unlawfully withheld or unreasonably delayed," as can district courts under the APA, 5 U.S.C. § 706(1). The Customs Service sometimes fails to act on significant matters for such extended periods that its inaction may amount to agency action, as defined by 5 U.S.C. § 551(13) to include "failure to act." An example is the failure or refusal of the Service to complete the final assessment of duties payable on an importation. Finally, the Customs Court has no power at present to provide relief until after the protest or petition process has run its course even though the Customs Service has taken action with such immediate and drastic impact on a person that a district court considering comparable action of another agency would treat it as final for purposes of review. The recommendation would provide for review by the Customs Court of the final actions and failures to act just described.

Decisions to exclude merchandise may be made either by the Customs Service or another agency, such as the Food and Drug Administration. All exclusion decisions pursuant to a customs law (i.e., a law applicable only to imported merchandise, usually codified in Title 19 of

¹ The Conference has not studied the advisability of a change in the reviewing forum for such action. Nor does the Conference intend that the current method of reviewing personnel actions of the Customs Service or its determinations under the Freedom of Information Act or like statutes be disturbed.



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the United States Code), whether made by the Customs Service or some other agency, are now reviewable in the Customs Court. This review would be unaffected by the recommendation. Exclusion decisions under a law that is not a customs law are never reviewed in the Customs Court. When such an exclusion decision is made by an agency other than the Customs Service, the Customs Court does not, and under the recommendation would not, review the decision. However, when such an exclusion decision is made by the Customs Service, the recommendation would give the Customs Court exclusive jurisdiction to review it.

The Customs Court has sometimes been said not to have "equity powers." What is meant by this is not clear, but the recommendation would give the Customs Court all powers, injunctive and other, of the district courts.

The Customs Court is unique among Article III courts in being subject to a requirement that not more than five of its nine judges be appointed from the same political party and in having a chief judge selected from time to time by the President. These requirements, appropriate perhaps for multi-member administrative agencies, are not consonant with the Article III judicial role of the Customs Court, especially as that role would be expanded by these recommendations.

1. *Jurisdiction Without a Protest or Petition.* Congress should amend 28 U.S.C. § 1582 to broaden the jurisdiction of the Customs Court by giving the court exclusive jurisdiction of any civil action brought to challenge final agency action (as defined in the Administrative Procedure Act) of the Customs Service except (1) action specifically subject to review in another court and (2) action pertaining to the exclusion of merchandise, under a law that is not a customs law, and taken by the Customs Service on the request or at the direction of a court or another federal agency.

2. *Remedial Powers.* Congress should amend 28 U.S.C. § 1581 to confer upon the Customs Court in respect of actions properly pending before it the remedial powers of a United States district court.

3. *Political Affiliation of Court Appointees and Selection of Chief Judge.* Congress should amend 28 U.S.C. § 251 to delete the requirement that not more than five of the nine judges of the Customs Court be appointed from the same political party and to provide that the chief judge is appointed by the President with the advice and consent of the Senate, as in the case of the Court of Claims and the Court of Customs and Patent Appeals.



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B. Standing to Seek Administrative and Judicial Review. Under Section 516 of the Tariff Act of 1930, 19 U.S.C. § 1516, an "American manufacturer, producer, or wholesaler" may ask for and receive information on the duty imposed on imported merchandise of a kind manufactured, produced or dealt in by him and, thereafter, contest the appraised value of, classification of, or the rate of duty assessed upon, that merchandise by petition to the Customs Service. As stated under heading A, a decision concerning such a petition may be reviewed in the Customs Court. The recommendation is that Congress consider broadening the category of persons entitled to seek this sort of administrative relief and, thereafter, review in the Customs Court to include all persons adversely affected by an incorrect determination by the Customs Service. The Conference believes that the category of persons eligible to challenge such determinations by the Customs Service should thus conform with modern administrative practice, unless Congress determines that overriding considerations of economic policy make this undesirable.

Only the importer of excluded merchandise may now protest within the Customs Service the exclusion of merchandise and have denial of that protest reviewed by the Customs Court. The recommendation contemplates a broadening of the standing provision to enable any adversely affected person to seek administrative and judicial review of action either to exclude or to admit merchandise (unless the action is taken under a law that is not a customs law upon the request or at the direction of a court or another agency).

Under A(1) final actions of the Customs Service other than the denial of protests or petitions relating to classification, appraisal, duty and admission of merchandise, such as the suspension of immediate delivery permits, would be subject to review in the Customs Court. The recommendation contemplates conferring upon any adversely affected person who has exhausted his administrative remedies standing to seek review of such actions. The recommendation does not specify what procedures must be exhausted.

1. Decisions Concerning Duties. Congress should consider amending Section 516 of the Tariff Act of 1930, 19 U.S.C. § 1516, to allow any person adversely affected by an incorrect determination of the appraised value of, classification of, or rate of duty assessed upon, imported merchandise to obtain from the Customs Service information concerning such appraisal, classification or rate and to petition for a change. Denials of such petitions should be reviewable in the Customs Court.

2. Exclusion Cases. Congress should consider enacting a new provision giving any person adversely affected by an action of the Customs Service, concerning merchandise that is, or



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should be, excluded from entry or delivery, a means of seeking administrative review of such action, with subsequent review in the Customs Court. Such a procedure should not be available to challenge action pertaining to the exclusion of merchandise, under a law that is not a customs law, and taken by the Customs Service on the request or at the direction of a court or another federal agency.

3. *Other Actions.* If Congress broadens the jurisdiction of the Customs Court as recommended in A(1), it should also consider providing that actions within the broadened jurisdiction may be brought by any adversely affected person who has exhausted his administrative remedies.

C. *Burden of Proof in the Customs Court.* The Customs Court operates under a statute that establishes a presumption that a Customs Service decision under review is correct and places upon a party seeking review the burden of proving the decision incorrect. Trial in the Customs Court is had on a record made in the court although 28 U.S.C. § 2632(f) provides that, upon the service of a summons, the Customs Service is to transmit certain documents underlying the Customs Service decision to the court "as part of the official record of the civil action." The Customs Court and the Court of Customs and Patent Appeals have inferred from the statute a further requirement, that in order to prevail the party seeking review must prove, in addition to the incorrectness of the agency's decision, what the correct decision should be. The recommendation would do away with that unorthodox further requirement and make Customs Court review of Customs Service actions conform in this respect with the review of actions of other agencies by other courts. The mode of review would continue to be a de novo trial (in the sense indicated above), which is considered appropriate because of the high degree of informality of most Customs Service procedures.

1. *Elimination of the Plaintiff's Double Burden.* Congress should amend 28 U.S.C. § 2635(a) to revise the Customs Court's standard of review in the following way: The presumption of correctness of Customs Service decisions and the imposition upon a party challenging a decision the burden of proving otherwise would be retained, but an additional requirement read into the statute by the Customs Court and the Court of Customs and Patent Appeals would be eliminated. The additional requirement is that the challenging party prove not only that the Customs Service was wrong but also what a correct decision would be or risk suffering affirmance of the incorrect adverse decision.

Specifically, the amended statute should provide that, if the Customs Court determines that action taken by the Customs Service is erroneous, the court should modify or set aside



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such action; if the court is able to determine what action is correct, it should so determine and order that the correct action be taken; if the court, after exhausting its processes and procedures, cannot determine what action is correct, it should remand the case to the Customs Service with instructions to take action consistent with the decision of the court; any redetermination made by the Customs Service pursuant to a remand should be subject to a new protest or petition; a decision by the Customs Court to remand a case should be appealable.

D. Review of Decisions to Exclude Merchandise. Exclusion of merchandise is a severe remedy. The recommendation would attempt to ensure expedited review of exclusion decisions and would delete the extraordinary authority of the Customs Service to detain and seize imported merchandise that allegedly infringes a United States trademark or copyright in the absence of the same sort of court order that is required before action may be taken against allegedly infringing domestic merchandise.

1. *Expedited Review.* Congress should amend the statutes giving preference to certain types of cases in the Customs Court, 28 U.S.C. § 2633, and the Court of Customs and Patent Appeals, 28 U.S.C. § 2602, to ensure a similar preference for cases properly before either court involving the exclusion of merchandise from entry or delivery.

2. *The Customs Service's Authority Under the Trademark and Copyright Statutes.* Congress should amend the statutes under which the Customs Service is authorized to detain and seize merchandise that allegedly infringes a United States trademark, 19 U.S.C. § 1526, or copyright, 17 U.S.C. § 603, to provide that the Customs Service may take no such action until after the owner of the trademark or copyright has obtained an order in a United States district court enjoining the importation. Alternatively, Congress should amend the trademark statute, as it has the copyright statute, to authorize the Customs Service to establish by regulation such a condition precedent to its acting to detain and seize allegedly infringing merchandise, and the Customs Service should promulgate such a regulation. In either event, the Customs Service should then adopt express procedures that would enable the owner of a trademark or copyright to identify imported merchandise that may infringe his mark or copyright.

E. Imposition of Civil Penalties. The penalty for violations of Section 592 of the Tariff Act of 1930, 19 U.S.C. § 1592, and some other import statutes is forfeiture of imported merchandise or its value. These penalty provisions are unsatisfactory. The statutory forfeiture penalty is likely to be disproportionate to the gravity of the alleged offense. Although the Customs Service is usually prepared to mitigate the penalty, the statutes pose the following



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dilemma: If the alleged violator does not wish to accept the proffered mitigation because he believes he did not violate the statute or because he believes that he is entitled to a greater degree of mitigation, he is subject to suit in the district court for the full forfeiture value. Moreover, he will lose the benefit of any mitigation if the government can prove a violation, however insignificant, on his part. The recommendation would rationalize penalty procedures.

1. *The Rationalization of Section 592.* Section 592 of the Tariff Act of 1930, 19 U.S.C. § 1592, prohibiting fraudulent or false statements or practices respecting imports, should be revised to make it fairer and more rational in its operation.

(a) Section 592 should be amended to provide for civil money penalties against the person violating the statute rather than for forfeiture of the merchandise or the full value thereof. Congress should establish maximum penalties based upon the revenue deficiency, if any, resulting from the violation and upon the degree of culpability of the violator. In any case in which the violation does not result in a revenue deficiency, the maximum penalties should be based upon a percentage of the value of the imported merchandise and upon the degree of culpability of the violator. If the violator is an importer, he should be given the option of surrendering his merchandise in lieu of payment of any penalty assessed.

(b) The Customs Service should continue to have the authority to mitigate civil penalties. If an assessment is contested, an action by the government to enforce the penalty should be in the Customs Court. In such an action, the government should have the burden of proving the act or omission constituting a violation and, if so alleged, the intentional nature thereof. The Customs Court should be authorized to determine de novo the amount of the penalty.

(c) In order to ensure that those subject to possible penalties under Section 592 know what is expected of them under the laws administered and enforced by the Customs Service, the Service should, to the maximum extent feasible, adopt and publish standards that will guide its determination under such laws.

(d) The authority of the Customs Service to seize and hold merchandise under Section 592, other than prohibited or restricted merchandise, should be limited to instances where such seizure and holding are necessary to protect its ability to collect any revenue deficiency or penalty, and the Customs Service should be required to release the merchandise to the owner upon his provision of security for payment of such revenue deficiency or penalty. Where no such release is effected by the owner, the Customs Service should be required to release the merchandise not later than 60 days after seizure unless the government has initiated an action



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in the Customs Court within that period and obtained an extension for cause from the court. In instances where the Customs Court permits the Service to hold merchandise for sale by the Service to satisfy any revenue deficiency or penalty determined by the judgment of the court, the net proceeds of such sale, after allowance for the judgment and costs of the sale, should be paid to the owner.

2. *Other Statutes.* Each of the other penalty provisions enforced by the Customs Service should be reviewed and, if appropriate, revised in a manner consistent with the foregoing recommendations for the revision of Section 592.

Citations:

42 FR 54251 (October 5, 1977)

___ FR _____ (2012)

4 ACUS 65

Note: This recommendation has been largely implemented by Pub. Laws 95-410, 96-39 and 96-417.